



PROGRAM MATERIALS
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Employer Strategies for When Off-duty Conduct Impacts the Workplace

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Employer Strategies for When Off-Duty Conduct Impacts the Workplace

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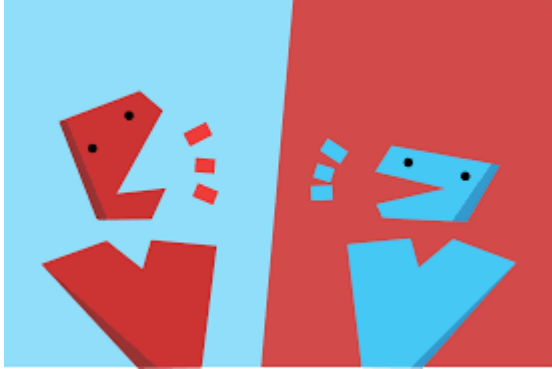
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Divisive Time in American History and Politics



Current Events Revive an Old Discussion



As people protest across the U.S., some wonder: Could you be fired for protesting?



MarketWatch

Doing these things on social media could cost you that job you want

The New York Times

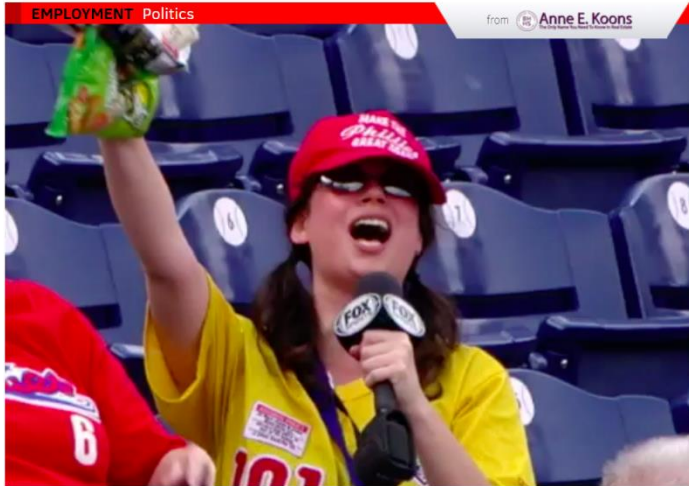
Should Social Media Activity Cost You Your Job?

Can comments on Facebook get me fired? Ask HR 

npr

Tell Us: Has A Social Media Post Cost You A Job?

Older Examples of Same Issue



Emily Youcis formerly served concessions at Citizens Bank Park.

SOURCE/MLB.COM



Citizens Bank Park's Pistachio Girl fired after 'alt-right' views gain publicity



The Philadelphia Inquirer

Jefferson Health fires employee over racist Facebook post

Jefferson Fires Employee Who Says She's 'Sick and Tired of All This Bulls— With the Black People'



Police posted thousands of offensive memes on Facebook. Now some of them are being fired.



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More Recent Examples, Some Play Out in Court



BBC

Amy Cooper: Woman sacked after calling police on black man



The Oregonian @Oregonian · Oct 5, 2020
In \$5.5 million lawsuit, former Portland schools leader says district fired him over conservative social media posts trib.al/gleIMW5

Woman Files \$10M Suit Over Firing For Role In Capitol Chaos



NEW YORK POST

Failed NJ congressional candidate says company fired him for lefty politics: suit

LAW.COM

In Social Media Post, NY Court Officer Implied George Floyd 'Deserved What He Got'

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Gina Carano Taken Down by Social Media Post



BBC

Gina Carano dropped from Mandalorian after 'abhorrent' posts

AP

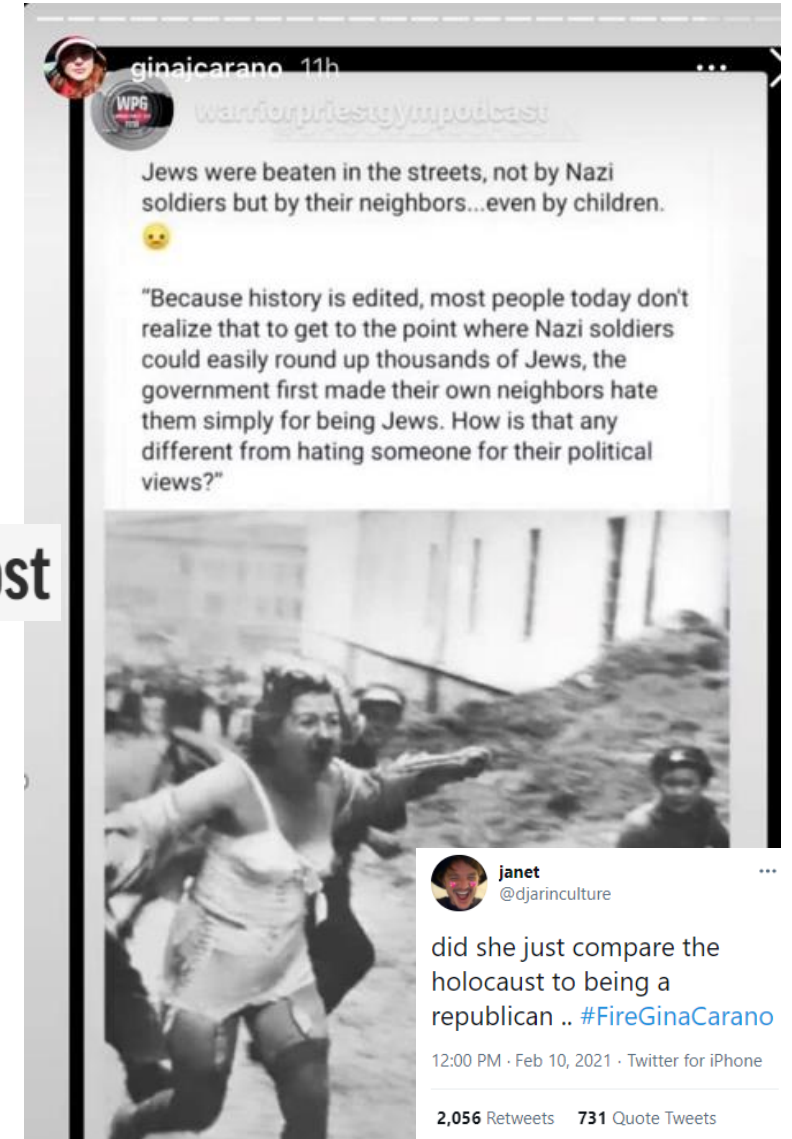
Gina Carano fired from 'Mandalorian' after social media post

npr

Lucasfilm Ditches Gina Carano From 'The Mandalorian' Over Social Media Posts

CNN entertainment

Lucasfilm fires 'The Mandalorian' star Gina Carano after offensive social media posts



Before You Act, Gather the Facts

- **Consider the facts:**
 - Are there photos, social media posts, videos, media coverage?
- **Consider employee's employment status:**
 - At-will employment?
 - Governed by an employment contract?
 - Governed by a collective bargaining agreement?
 - Subject to “just cause” process prior to termination?
 - Any tenure policy implicated?



Before You Act, Review Your Policies

- **Review employee handbook**
 - Policy regarding off-duty conduct?
 - Policy regarding call out procedures?
- **Review other applicable company policies**
 - Company values
 - Code of Conduct
 - Policy governing behavior that brings reputational harm to Company
 - COVID-19 policies and self-certifications
- **Review how the Company has handled similar situations in the past**
 - Consistency is key



Statutes, Regulations, Ordinances, and Public Policy

- **Consider state and local laws**
 - Any prohibitions on private employers taking employment actions for “lawful” off-duty conduct?
 - Any local or state laws protecting an employee’s political activities outside of work?
 - Potential for a wrongful termination claim based on public policy?
- **COVID-19 reporting obligations**
 - If event or rally was a “super-spreader” – how do you ensure safety and health of other employees in the workplace?



But What About the 1st Amendment?

- **It doesn't apply to private employers!**
- The First Amendment provides broad (not absolute) freedom from *government* censorship.
- It **does not** give employees the right to post, tweet, or say anything they like without consequence in the workplace.
- **But...** don't forget protections provided by the NLRA



The First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

California

CHAPTER 5. Political Affiliations [1101 - 1106] (Chapter 5 enacted by Stats. 1937, Ch. 90.)

1101. No employer shall make, adopt, or enforce any rule, regulation, or policy:

(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.

(Enacted by Stats. 1937, Ch. 90.)

1102. No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

(Enacted by Stats. 1937, Ch. 90.)

New York Consolidated Laws, Labor Law - LAB § 201-d. Discrimination against the engagement in certain activities

2. Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

- a. an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal, provided, however, that this paragraph shall not apply to persons whose employment is defined in [paragraph six of subdivision \(a\) of section seventy-nine-h of the civil rights law](#) , and provided further that this paragraph shall not apply to persons who would otherwise be prohibited from engaging in political activity pursuant to chapter 15 of title 5 and subchapter III of chapter 73 of title 5 of the USCA;
- b. an individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property;
- c. an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property; or
- d. an individual's membership in a union or any exercise of rights granted under Title 29, USCA, Chapter 7 or under article fourteen of the civil service law.

Colorado

24-34-402.5. Unlawful prohibition of legal activities as a condition of employment.

(1) It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:

(a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or

(b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

(2) (a) Notwithstanding any other provisions of this article, the sole remedy for any person claiming to be aggrieved by a discriminatory or unfair employment practice as defined in this section shall be as follows: He or she may bring a civil action for damages in any district court of competent jurisdiction and may sue for all wages and benefits that would have been due him or her up to and including the date of the judgment had the discriminatory or unfair employment practice not occurred; except that nothing in this section shall be construed to relieve the person from the obligation to mitigate his or her damages.

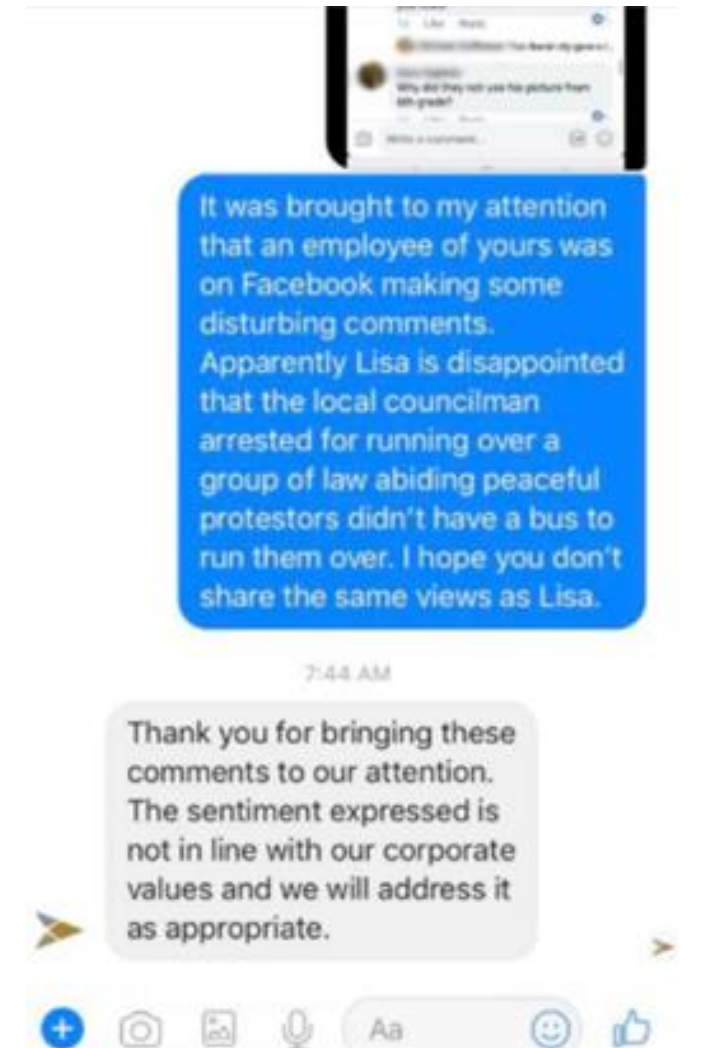
(b) (I) If the prevailing party in the civil action is the plaintiff, the court shall award the plaintiff court costs and a reasonable attorney fee.

(II) This paragraph (b) shall not apply to an employee of a business that has or had fifteen or fewer employees during each of twenty or more calendar work weeks in the current or preceding calendar year.

Source: L. 90: Entire section added, p. 1222, 1, effective July 1. **L. 2007:** (2) amended, p. 859, 1, effective July 1.

Litigation Example

- Plaintiff, who is white, sued for race discrimination after she was terminated by a financial institution for violating the Company's Code of Conduct and social media policy.
- The Company was "inundated" with complaints after the Plaintiff posted a comment on her personal Facebook account, which was open to the public.
- Plaintiff's post was in response to a news story about a councilman who drove through a crowd of demonstrators protesting the death of Antwon Rose, Jr., who had been shot and killed by a police officer.
- Plaintiff commented: "Total BS. He should have taken a bus to plow thru [sic]."

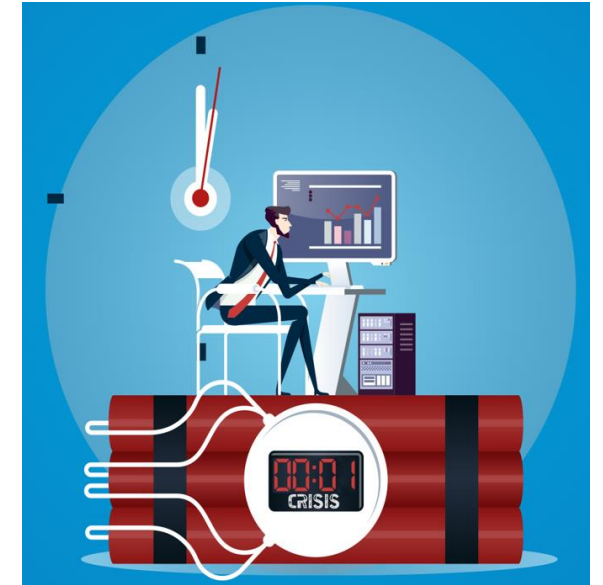


Business Considerations

- **Consider the following:**
 - What precedent are you setting?
 - How will customers and other employees react?
 - What press might you receive?
- **Make your decision by:**
 - Properly investigate the issue
 - Apply your company policies consistently and follow past practice
 - Tie your decision to business-related considerations

Crisis Management

- Have a crisis management plan in place.
- Plan a response with a long-term message that focuses on rebuilding reputation.
 - Controlled message
 - Coaching of company representatives
- Review and revise your crisis management plan with your business teams and legal experts periodically.



Practical Takeaways

- Determine what laws are applicable to the off-duty conduct of your company's employees.
- Review your code of conduct and company policies to address off-duty conduct that negatively impacts the workplace or the company.
- Review handbook policies on social media use.
 - Remind employees to **STOP** and **THINK** before they email, text, post, or tweet
 - Prohibit posts that violate Company policy
 - It only takes one inappropriate shared email, text, or post to ruin an employee's efforts to build a positive reputation



Practical Takeaways

- Consider communications or trainings to educate employees regarding the company's stance on these activities.
 - Ensure employees are aware of COVID-19 procedures and ramifications of violating them or making false statements on company forms.
- Work with your media relations and legal team to ensure you have messages and plans ready.



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